

**In The Matter Of:**

*AMERICAN ZURICH INSURANCE COMPANY, ET AL v.  
J. CRISMAN PALMER, ET AL*

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*WITNESS: MIKE ABOUREZK  
September 1, 2022*

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*PRUSS REPORTING  
662 Enchanted Pines Drive  
Rapid City, South Dakota 57701  
(605) 390-3427  
prussreporting@gmail.com*

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**EXHIBIT**

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<p>1 involved in at least since Judge Viken has taken 2 the bench, has there been after an answer an order 3 issued requiring the parties to meet and to set 4 certain deadlines and as well the requirement that 5 the plaintiff provide a demand? 6 A Yeah, I'm having a hard time saying that it's a 7 hard and fast requirement. I can't remember 8 exactly how it's worded, but it -- it encourages 9 settlement discussions. And I can't say that I do 10 that in every case. Sometimes I just forget. 11 Q Will you please turn to Exhibit 19 that was marked 12 yesterday? 13 A I have it. 14 Q Exhibit 19 is a letter from you to Cris Palmer 15 dated September 24, 2015; is that right? 16 A Yes. 17 Q And in this letter are you making a settlement 18 offer of \$325,000? 19 A Correct. 20 Q How did you determine that number? 21 A Well, I look at the numbers in the case, the 22 existing numbers. You know, how much -- how -- 23 how much in benefits did the denial involve. 24 What -- what kind of consequences did that have. 25 But, in general, I just try to give a number that</p>	<p>1 getting slapped in the face, if you don't let them 2 haggle a little bit. But, you know, 300 was 3 probably the bottom. Or something awful close. 4 Q You testified earlier that it's your practice to 5 tell opposing counsel in the offer that if it's 6 not accepted, the number is going to go up, and 7 you mean it. 8 A Right. 9 Q Did you provide that information in Exhibit 19? 10 A Yeah, I think I did, didn't I? Let's see. 11 Q You did. 12 A Yeah. 13 Q And that's in the second paragraph, you 14 specifically said, If you don't accept this, the 15 number is going up? 16 A Right. 17 Q And then in the last line of the letter -- well, 18 third full paragraph, you wrote, quote, We reserve 19 the right to withdraw this offer at any time prior 20 to written acceptance by Zurich. Did you write 21 that? 22 A Right. 23 Q Why did you put that in there? 24 A Well, because, you know, my whole point in -- in 25 trying to do this is to get something done</p>
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<p>1 I think would make my client happy and a number 2 that I think defense counsel would recognize is a 3 good deal for his client, that defense counsel 4 will recognize is a deal that the client -- that 5 his client really should not pass up. 6 And then, like, if they pass it up, I don't 7 lose any sleep over it, because usually what 8 happens when they pass it up is the case explodes 9 somewhere down the line and the adjuster or people 10 involved on the insurance company side face career 11 risk. It's like throwing a hand grenade into 12 their foxhole, an offer like this (indicating). 13 Because if they haven't got the sense to take it, 14 I know that later on they're going to be -- you 15 know -- these companies eat their own, and that's 16 what they end up doing. They do it every time 17 that they don't take one of these settlement 18 offers. Somebody has to pay. Somebody has got to 19 be blamed, and it happens all the time. 20 Q The \$325,000 offer in Exhibit 19, was that a 21 take-it-or-leave-it number? 22 A No, I usually leave -- I usually leave a little 23 bit of wiggle room just to make them feel like, 24 you know, they're getting something for their 25 negotiating. Otherwise they feel like they're</p>	<p>1 relatively quickly. That doesn't mean it has to 2 be in the next week or even the next 30 days, but 3 if they -- you know, if they sit around on it and 4 then -- and then make me do all kinds of work on 5 the case for a year or something like that, I 6 don't want them coming back and holding me to 7 something that I proposed a year earlier, because 8 the situation changes. 9 Part -- part of my rationale is if you sit 10 down and get serious and do it quickly, you're 11 entitled to a significant discount off of what I 12 think I can actually do with the case. And I 13 don't feel bad about doing that with my clients 14 because I'm not -- this is not a quadraplegic 15 case. It's not a case where my client is 16 financially out an awful lot of money or -- or has 17 got lifetime injuries that they're going to be 18 dealing with. This is just a case of cheating by 19 an insurance company. And if they sit down and 20 get serious about it quickly -- I want to resolve 21 cases. That's why I bring them. And if I can do 22 that without them trying to put me through the 23 obstacle course and the scorched earth tactics, 24 then they get a whopping discount. 25 (Whereupon, Exhibit 43 was then marked.)</p>



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<p style="text-align: right;">Page 37</p> <p>1 Q (BY MR. SUTTON) Mike, I've handed you Exhibit 43</p> <p>2 which is Defendants' Responses to Plaintiff's</p> <p>3 Requests for Production of Documents in the</p> <p>4 underlying Leichtnam bad faith case.</p> <p>5 A Right.</p> <p>6 Q Will you turn to page 7 of this document? What is</p> <p>7 the date that these responses were provided?</p> <p>8 A Well, it says October 2, 2015.</p> <p>9 Q And is that consistent with when you recall in</p> <p>10 early October of 2015 receiving the discovery</p> <p>11 responses from Zurich?</p> <p>12 A Well, I thought I got a set of unexecuted</p> <p>13 responses to start with, but I can't tell. I</p> <p>14 don't dispute the date that's on here.</p> <p>15 Q In any event, even if you received an earlier</p> <p>16 unexecuted -- by at least early October of 2015,</p> <p>17 you're receiving an executed set of the responses;</p> <p>18 is that right?</p> <p>19 A That appears to be right.</p> <p>20 Q And that's Exhibit 43, correct?</p> <p>21 A Excuse me?</p> <p>22 Q That's Exhibit 43?</p> <p>23 A Right.</p> <p>24 Q And true and accurate of what you received?</p> <p>25 A Yeah.</p>	<p style="text-align: right;">Page 39</p> <p>1 requests compare to what you typically see from</p> <p>2 insurance companies in responding to your written</p> <p>3 discovery?</p> <p>4 MR. HOYT: Objection; vague, overbroad,</p> <p>5 ambiguous, calls for a conclusion without</p> <p>6 foundation.</p> <p>7 A It's -- it's fairly typical for them to not want</p> <p>8 to comply and provide most of the documents. Some</p> <p>9 of Zurich's responses were flat out false.</p> <p>10 Q (BY MR. SUTTON) What are you referring to?</p> <p>11 MR. HOYT: Objection. Objection; lack of</p> <p>12 foundation, characterization.</p> <p>13 A Like, what am I referring to when I say --</p> <p>14 Q (BY MR. SUTTON) Yeah, when you say flat out false,</p> <p>15 what request are you referring to?</p> <p>16 MR. HOYT: Same objection.</p> <p>17 A Well, Request 6, for instance, says -- it asks for</p> <p>18 all documents that would reflect that the amount</p> <p>19 paid in claims is or has been considered in any</p> <p>20 manner when evaluating any of the compensation</p> <p>21 provided to any of the personnel described in</p> <p>22 Request No. 2, whether it be through average claim</p> <p>23 costs, loss ratios -- and then it says -- there is</p> <p>24 a typo -- mind ratios. I don't think that is an</p> <p>25 accurate transcription -- but mind ratios -- it</p>
<p style="text-align: right;">Page 38</p> <p>1 (Whereupon, Exhibit 44 was then marked.)</p> <p>2 Q (BY MR. SUTTON) Exhibit 44 is a letter from you to</p> <p>3 Cris Palmer dated December 2, 2015, Bates stamped</p> <p>4 GPNA 4157 to 416 -- or, strike that. Start over.</p> <p>5 Bates stamped 4157 to 4176; is that right?</p> <p>6 A Yes.</p> <p>7 Q As I'm getting older I may have to have them</p> <p>8 increase the size of the print. I realize I'm</p> <p>9 probably preaching to the choir, but I can't read</p> <p>10 that.</p> <p>11 MR. HOYT: It's called Lasix surgery.</p> <p>12 Q (BY MR. SUTTON) Do you -- Exhibit 44, is this a</p> <p>13 true and accurate copy of a meet-and-confer letter</p> <p>14 that you sent to Cris in December of 2015?</p> <p>15 A Yeah, I think so.</p> <p>16 Q Explain to me what caused you to write this</p> <p>17 meet-and-confer letter.</p> <p>18 A Zurich's responses didn't comply with the rules.</p> <p>19 Didn't -- didn't comply with -- I don't know if</p> <p>20 they complied with one or two of the full set</p> <p>21 of -- how many requests were there? Let's see.</p> <p>22 20 some requests. And I suppose they might have</p> <p>23 complied with one or two, or might have produced</p> <p>24 some documents with respect to one or two.</p> <p>25 Q How did Zurich's responsiveness to the pending</p>	<p style="text-align: right;">Page 40</p> <p>1 probably was supposed to be combined ratios,</p> <p>2 underwriting profit, or any other metric. The</p> <p>3 scope of this request is January 1, 2002, to</p> <p>4 present.</p> <p>5 Q And you're reading from Bates stamp GPNA 4162 on</p> <p>6 Exhibit 44; is that right?</p> <p>7 A Right.</p> <p>8 Q And why did you say that the response was false?</p> <p>9 MR. HOYT: Same objections.</p> <p>10 A Because when I finally got all of their -- when I</p> <p>11 finally got personnel files and other documents --</p> <p>12 when the -- after the Court ordered them to comply</p> <p>13 and I got personnel files and performance</p> <p>14 evaluations and incentive plans, Zurich had some</p> <p>15 of the most explicit documents linking the</p> <p>16 evaluation of claim personnel with how much that</p> <p>17 they pay out in claims that I have ever seen. A</p> <p>18 lot of companies do that, but over the last</p> <p>19 30 years most of them have gotten more</p> <p>20 sophisticated about hiding it. Zurich, for</p> <p>21 whatever reason, didn't feel the need to hide</p> <p>22 anything in their -- in their performance</p> <p>23 evaluations. Now, they -- they wouldn't turn them</p> <p>24 over without a court order. But when they did</p> <p>25 turn them over, it was clear that their response</p>



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<p>1 to this request -- and this is just an example --</p> <p>2 they responded none. Which was a fat -- flat out</p> <p>3 lie.</p> <p>4 Q (BY MR. SUTTON) Were there other discovery</p> <p>5 responses that you received from Zurich that you</p> <p>6 found to be inaccurate?</p> <p>7 A Oh, numerous. And if you read through this --</p> <p>8 I -- Request 6 is the one that jumps out at me</p> <p>9 today, years later, and I haven't sat down and</p> <p>10 read through this. I -- this is the first time</p> <p>11 I've seen this letter in years. Seven years. I'm</p> <p>12 assuming that if you read through this letter, and</p> <p>13 more importantly if you read through the brief</p> <p>14 that was written in support of the Motion to</p> <p>15 Compel Zurich to comply with the document request,</p> <p>16 you will see more examples.</p> <p>17 (Whereupon, Exhibit 45 and Exhibit 46 were</p> <p>18 then marked.)</p> <p>19 Q (BY MR. SUTTON) Mike, you've been handed Exhibit 45</p> <p>20 which is a letter from you to Cris Palmer dated</p> <p>21 December 18, 2015, and Bates stamped GPNA 4154; is</p> <p>22 that right?</p> <p>23 A Yes.</p> <p>24 Q Did you write this letter to Cris on December 18,</p> <p>25 2015?</p>	<p>1 the bottom up. So the first email in the chain is</p> <p>2 you emailing Cris on March 24; is that right,</p> <p>3 Mike?</p> <p>4 A Yes.</p> <p>5 Q And on the second page of that you indicate that</p> <p>6 you're going to be starting to put together a</p> <p>7 motion to compel if Zurich doesn't get back to you</p> <p>8 on their discovery deficiencies; is that right?</p> <p>9 A Right.</p> <p>10 Q Then when we go back to the first page of</p> <p>11 Exhibit 47, did Cris respond to you on March 24,</p> <p>12 2016, at 3:36 p.m.?</p> <p>13 A Yes.</p> <p>14 Q And in his email he indicated that he's talking</p> <p>15 with his client about settlement and that he'll</p> <p>16 get back to you; is that right?</p> <p>17 A Right.</p> <p>18 Q Will you please turn to Exhibit 26 that was marked</p> <p>19 yesterday? Exhibit 26 is a letter dated April 27,</p> <p>20 2016, from Cris Palmer to you; is that right?</p> <p>21 A Yes.</p> <p>22 Q And in this email -- or excuse me -- in this</p> <p>23 letter Cris indicates that he and Zurich would</p> <p>24 like to try and mediate the case; is that right?</p> <p>25 A Yes.</p>
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<p>1 A Yes.</p> <p>2 Q And is this a true and accurate copy of the letter</p> <p>3 you wrote?</p> <p>4 A Yes.</p> <p>5 Q This is the follow-up to the December 2</p> <p>6 meet-and-confer letter; is that right?</p> <p>7 A Yes.</p> <p>8 Q And then will you turn to Exhibit 46?</p> <p>9 A Yes.</p> <p>10 Q Is Exhibit 46 Cris's response to your December 18,</p> <p>11 2015, letter?</p> <p>12 A Appears to be.</p> <p>13 Q And is that a true and accurate copy of the letter</p> <p>14 you received?</p> <p>15 A Yes.</p> <p>16 (Whereupon, Exhibit 47 was then marked.)</p> <p>17 Q (BY MR. SUTTON) Exhibit 47 is an email chain Bates</p> <p>18 stamped GPNA 4299 and 4300. Looking at the</p> <p>19 bottom email -- or the oldest email, that's an</p> <p>20 email from you to Cris Palmer on March 24, 2016;</p> <p>21 is that right?</p> <p>22 A Yes. From Cris to me, yes.</p> <p>23 Q Well, let's look at the bottom one first.</p> <p>24 A Oh. The bottom one.</p> <p>25 Q Because with emails we've always got to read from</p>	<p>1 Q Did you ultimately agree to mediate the case?</p> <p>2 A Yes.</p> <p>3 Q Do you recall having any discussions with Cris,</p> <p>4 Mike, before the mediation about whether the</p> <p>5 settlement value -- or the demand that you were</p> <p>6 going to make was going to go up at the mediation?</p> <p>7 A I don't remember having conversations with him.</p> <p>8 That doesn't mean that we didn't have some. But I</p> <p>9 don't have any recollection of conversations.</p> <p>10 Q Did a mediation ultimately occur?</p> <p>11 A Yes.</p> <p>12 Q And who was the mediator?</p> <p>13 A Lon Kouri.</p> <p>14 Q Do you remember who attended the mediation? Let's</p> <p>15 start on -- in your caucus.</p> <p>16 A Joe Leichtnam, Mike Simpson, and myself.</p> <p>17 Q Do you know who was in the caucus for Zurich?</p> <p>18 A I know that Dawn Wagner -- and I had forgotten her</p> <p>19 last name, but there it is on my computer screen.</p> <p>20 Dawn Wagner was there from Zurich.</p> <p>21 Q Did you have any discussions with Ms. Wagner</p> <p>22 during that?</p> <p>23 A Said hello and how are you and that was about the</p> <p>24 extent of it.</p> <p>25 (Whereupon, Exhibit 48 was then marked.)</p>



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<p style="text-align: right;">Page 49</p> <p>1 Q (BY MR. SUTTON) He objected there wasn't a question 2 pending. I'm just posing the question back to 3 you, Mike. 4 A Right. Everything about the way Cris Palmer 5 negotiates softens my settlement position because 6 it's consistent with my philosophy, that if 7 somebody is interested in getting something 8 resolved, I'm going to work with them. And Cris 9 expresses a good faith approach to trying to 10 resolve things as opposed to just dragging them 11 out so he can turn the file into a major billing 12 event which is what happens with a lot of the 13 firms. Everything about the way he negotiates 14 makes me -- draws me into the process and makes me 15 want to resolve something rather than fighting. 16 Everything that Zurich did here, filing 17 responses to discovery requests that are false, I 18 mean, patently false. I've seen enough of these 19 files -- when they tell me there is no documents 20 of the sort that are requested in Request 6, I 21 know better. And everything about the way Zurich 22 negotiated, which was in a word stonewalling, 23 hardened my settlement position. 24 Q Mike, will you look at Exhibit 49, please? That's 25 an email from you to Cris Palmer on December 5,</p>	<p style="text-align: right;">Page 51</p> <p>1 along the line here, or maybe not. I know that 2 the claim file was one of the first documents they 3 actually did provide, and I don't remember if that 4 was part of the initial disclosures under Rule 26 5 or if that was in response to my document request. 6 But they gave a claim file and then it seems like 7 I had to fight for a long time for anything 8 more -- or much more. 9 (Whereupon, Exhibit 50 was then marked.) 10 MR. SUTTON: Let's take a break. 11 (A recess was taken from 10:17 to 10:30 a.m.) 12 Q (BY MR. SUTTON) Okay. Mike, you've been handed 13 Exhibit 50 which I'll represent to you is a 14 printout as of this morning of the entire docket 15 sheet for the Leichtnam vs. Zurich bad faith case 16 in which you were counsel. Does this appear 17 accurate to the best of your knowledge? 18 A Yeah, I mean -- let's see -- yeah. It looks 19 right. 20 (Whereupon, Exhibit 51 and Exhibit 52 were 21 then marked.) 22 Q (BY MR. SUTTON) Mike, you have also been handed 23 Exhibit 51 and 52. Exhibit 51, is this a true and 24 accurate copy of the Motion to Compel that you 25 filed on behalf of your client in the bad faith</p>
<p style="text-align: right;">Page 50</p> <p>1 2017; is that right? 2 A Yes. 3 Q And is that a true and accurate copy of the email 4 that you sent to Cris? 5 A Yes. 6 Q And I note in the first sentence you indicate at 7 the end of the first sentence, quote, We need to 8 either get Zurich to comply with the doc requests 9 or get a motion filed, closed quote. First of 10 all, did I read that correctly? 11 A Which sentence is that? First? Last? What? 12 Q It's the end of the first sentence of the first 13 paragraph. 14 A Yes, that's accurate. 15 Q So I'm gathering from this email -- I mean, do you 16 recall whether you had received any supplemental 17 documents in response to your meet-and-confer 18 letter? 19 A Well, I don't know if I had received any 20 supplemental documents, but I know that they 21 hadn't complied. They hadn't complied. They 22 hadn't even substantially complied. I don't even 23 know that they had minimally complied, but they 24 had provided -- I'm -- I'm not sure. I think that 25 they had probably provided a claim file somewhere</p>	<p style="text-align: right;">Page 52</p> <p>1 case? 2 A Yeah, it looks like the first Motion to Compel. 3 Q What is the date of this filing? 4 A It says filed 12/18 on the motion and then it says 5 filed 12/19 on the brief. 6 Q And Exhibit 52 is the supporting brief; is that 7 right? 8 A Right. And this is a redacted copy. 9 Q Correct. The -- and I'll represent the reason for 10 that is the unredacted copy is not available on 11 the court system. 12 A PACER? 13 Q PACER, correct. That's where I pulled it from. 14 A Okay. You don't have a copy of the actual brief? 15 Q I suspect we do, but I just -- in fact, I'm sure 16 we do. It's just this is the one I marked. 17 (Whereupon, Exhibit 53 was then marked.) 18 Q (BY MR. SUTTON) And before we get to 53, 19 Exhibit 52, will you turn to the last page of 20 that? 21 A Talking about the Certificate of Service or the 22 page before that? 23 Q Let's go to the page before. Who signed this 24 brief? 25 A I did.</p>



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<p>1 Q Did you write it?</p> <p>2 A Yes.</p> <p>3 Q Was everything accurate in it to the best of your</p> <p>4 knowledge when you wrote it?</p> <p>5 A Yes.</p> <p>6 Q Exhibit 53 then, I just want you to confirm that</p> <p>7 this is the response brief in opposition to the</p> <p>8 Motion to Compel which was filed in the bad faith</p> <p>9 case?</p> <p>10 A Yes.</p> <p>11 (Whereupon, Exhibit 54 and Exhibit 55 were</p> <p>12 then marked.)</p> <p>13 Q (BY MR. SUTTON) Mike, you've been handed three</p> <p>14 exhibits. The -- what is the first of the</p> <p>15 three -- Exhibit 53, can you please find that for</p> <p>16 me, Mike?</p> <p>17 A Yeah, I got it.</p> <p>18 Q And in Exhibit 53, can you tell me what the title</p> <p>19 of that pleading is?</p> <p>20 A Defendants' Response to Plaintiff's Motion to</p> <p>21 Compel.</p> <p>22 Q Exhibit 54, what is Exhibit 54?</p> <p>23 A Motion For Admission of Non-Resident Attorney.</p> <p>24 Q And which non-resident attorney is subject to that</p> <p>25 motion?</p>	<p>1 senior partner that was lead counsel on the case</p> <p>2 was Jim Hofert. And I met Conrad Nowak because we</p> <p>3 tried the case in 2009. And Conrad was at counsel</p> <p>4 table during trial.</p> <p>5 Q What was the outcome of that trial?</p> <p>6 A A 6.27 million verdict.</p> <p>7 Q What did Mr. Hofert tell you before the trial?</p> <p>8 A He said, You're going to get a big verdict and I'm</p> <p>9 going to get fired.</p> <p>10 Q Any other time that you recall having any cases</p> <p>11 with either Mr. Nowak or Mr. Glazer?</p> <p>12 A No.</p> <p>13 Q Now, in February -- shortly after these motions</p> <p>14 for admission of non-resident attorney, do you</p> <p>15 recall that the Court entered an order admitting</p> <p>16 both Mr. Glazer and Mr. Nowak as pro hac into the</p> <p>17 District of South Dakota?</p> <p>18 A Did the Court enter an order admitting them?</p> <p>19 Q Yes.</p> <p>20 A Yes.</p> <p>21 Q Once they were admitted, who did you primarily</p> <p>22 communicate with regarding the matters in the bad</p> <p>23 faith case?</p> <p>24 A Well, the first contact I had was with Jim Hofert.</p> <p>25 I remember he called me and said, I'm getting into</p>
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<p>1 A Conrad Nowak.</p> <p>2 Q Okay. And Exhibit 55, is that the Motion For</p> <p>3 Admission of Non-Resident Attorney for Paris</p> <p>4 Glazer?</p> <p>5 A No. This is an Order Granting Extension.</p> <p>6 Q I'm missing one. Hold on.</p> <p>7 (Whereupon, Exhibit 56 was then marked.)</p> <p>8 Q (BY MR. SUTTON) Okay. So let's go back on --</p> <p>9 Exhibit 56, is that the Motion for Admission of</p> <p>10 Non-Resident Attorney of Paris Glazer?</p> <p>11 A Yes.</p> <p>12 Q And what are the dates on both Exhibit 54 and 56?</p> <p>13 A February 1, 2018.</p> <p>14 Q Before this case had you ever worked with either</p> <p>15 attorneys Glazer or Conrad Nowak?</p> <p>16 A I had worked with Conrad Nowak.</p> <p>17 Q Do you recall how long ago that was?</p> <p>18 A 2008 and 2009.</p> <p>19 Q What was the nature of the case?</p> <p>20 A It was a case called McElgunn vs. Cuna Mutual.</p> <p>21 Q Was that a bad faith case?</p> <p>22 A Yes.</p> <p>23 Q What was Mr. Nowak's role in the defense of that</p> <p>24 case as you recall?</p> <p>25 A He was an associate at the Hinshaw firm. And the</p>	<p>1 this case. After -- I don't remember if it was</p> <p>2 before or after this motion for admission, but</p> <p>3 somewhere around that time frame he called me.</p> <p>4 Then as the case proceeded, most of my contacts</p> <p>5 were with Paris Glazer, although I also had</p> <p>6 contacts with Conrad.</p> <p>7 Q After the admission of Mr. Glazer and Mr. Nowak,</p> <p>8 did you have -- do you recall having any</p> <p>9 substantive discussions about the bad faith case</p> <p>10 with Cris Palmer?</p> <p>11 A I don't think so. I don't recall. I do not</p> <p>12 recall having any conversations with him. I don't</p> <p>13 recall him really being involved very much. At</p> <p>14 least all the day-to-day business was with the</p> <p>15 Hinshaw firm.</p> <p>16 Q And then will you turn to Exhibit 55, please?</p> <p>17 A Okay. The Order Granting Extension?</p> <p>18 Q Correct. What's the date on Exhibit 55?</p> <p>19 A December 21, 2017.</p> <p>20 Q In the first paragraph on the order, when does it</p> <p>21 indicate that the discovery deadline is?</p> <p>22 A Within 60 days of the Court's disposition of</p> <p>23 plaintiff's Motion to Compel discovery.</p> <p>24 Q And the Motion to Compel discovery referenced in</p> <p>25 that order is the Motion to Compel that we</p>



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<p style="text-align: right;">Page 57</p> <p>1 previously talked about as Exhibit 51, right?</p> <p>2 <b>A Right.</b></p> <p>3 Q So at least at the time of Exhibit 55, discovery</p> <p>4 remained open; is that correct?</p> <p>5 <b>A Right.</b></p> <p>6 <b>(Whereupon, Exhibit 57 was then marked.)</b></p> <p>7 Q (BY MR. SUTTON) Is that Exhibit 57, Mike?</p> <p>8 <b>A Yes.</b></p> <p>9 Q Exhibit 57, for the record, is the Order Granting</p> <p>10 In Part and Denying In Part Plaintiff's Motion to</p> <p>11 Compel which is Bates stamped GPNA 633 to 655; is</p> <p>12 that right?</p> <p>13 <b>A Yes.</b></p> <p>14 Q What's the date that this order was issued?</p> <p>15 <b>A Filed September 30, 2018.</b></p> <p>16 Q And this is the order, when you look at the</p> <p>17 introductory paragraph, ruling on your Motion to</p> <p>18 Compel doc 38?</p> <p>19 <b>A Yeah, I don't remember it being doc 38. Maybe</b></p> <p>20 <b>there was a filing error or something. I thought</b></p> <p>21 <b>it was something like docket 34, but I -- I don't</b></p> <p>22 <b>know.</b></p> <p>23 Q And in 51 it says that it's document 31, you're</p> <p>24 right. Do you recall whether Exhibit 57 is the</p> <p>25 Order Ruling on the Motion to Compel that we've</p>	<p style="text-align: right;">Page 59</p> <p>1 <b>A Sure. And not unexpected because there is --</b></p> <p>2 <b>there is hoards of case law on all of these</b></p> <p>3 <b>requests. I could probably pull up verbatim</b></p> <p>4 <b>requests that the Court had approved a half a</b></p> <p>5 <b>dozen times in previous cases.</b></p> <p>6 <b>(Whereupon, Exhibit 58 was then marked.)</b></p> <p>7 Q (BY MR. SUTTON) Exhibit 58, for the record, is</p> <p>8 Zurich's motion for leave to file an amended</p> <p>9 answer and affirmative defenses, which was filed</p> <p>10 on September 7, 2018; is that right?</p> <p>11 <b>A Yes.</b></p> <p>12 Q What's the docket number at the top of -- or the</p> <p>13 document number -- let me start over -- at the top</p> <p>14 of Exhibit 58?</p> <p>15 <b>MR. HOYT:</b> This one has already been marked</p> <p>16 yesterday.</p> <p>17 <b>MR. SUTTON:</b> Okay. What number? I knew you</p> <p>18 marked the brief. I didn't know you marked the</p> <p>19 motion.</p> <p>20 <b>MR. HOYT:</b> Yeah, I think I did. It would be</p> <p>21 Exhibit 10.</p> <p>22 <b>MR. SUTTON:</b> Okay. Let's do this on the</p> <p>23 record. Hand that back, Mike.</p> <p>24 Q (BY MR. SUTTON) Will you find Exhibit 10 in the</p> <p>25 stack that was there?</p>
<p style="text-align: right;">Page 58</p> <p>1 been talking about?</p> <p>2 <b>A Yeah. Plaintiff's first Motion to Compel, I'm</b></p> <p>3 <b>sure.</b></p> <p>4 Q Will you please turn to GPNA 640?</p> <p>5 <b>A Okay.</b></p> <p>6 Q And here is what I'm going to do with this. I</p> <p>7 just want to confirm -- and there is two ways we</p> <p>8 can do it, Mike. Either we can walk through each</p> <p>9 one or let me ask the question generally if you</p> <p>10 remember what it was, and if not we'll walk</p> <p>11 through each one.</p> <p>12 Do you recall that other than limiting the</p> <p>13 date scope, the Court granted all of your requests</p> <p>14 in the Motion to Compel in Exhibit 57?</p> <p>15 <b>MR. HOYT:</b> I'll object. The document is the</p> <p>16 best evidence of that. It says, Granted in part,</p> <p>17 denied in part.</p> <p>18 Q (BY MR. SUTTON) That's fine. We'll walk through</p> <p>19 it.</p> <p>20 <b>A Well, the Court either granted all of them with</b></p> <p>21 <b>the exception of making some kind of adjustments.</b></p> <p>22 <b>For the most part -- I mean, I would say 90 some</b></p> <p>23 <b>percent of the motion was granted.</b></p> <p>24 Q Did you consider the Motion to Compel to have been</p> <p>25 successful from your perspective?</p>	<p style="text-align: right;">Page 60</p> <p>1 <b>A Got it.</b></p> <p>2 Q Exhibit 10, is that the Motion to Amend -- strike</p> <p>3 that. Is that Zurich's Motion For Leave To File</p> <p>4 Amended Answer and Affirmative Defenses?</p> <p>5 <b>A Correct.</b></p> <p>6 Q What is the document number at the top of</p> <p>7 Exhibit 10?</p> <p>8 <b>A Document 56.</b></p> <p>9 <b>(Whereupon, Exhibit 58 was then remarked.)</b></p> <p>10 Q (BY MR. SUTTON) Exhibit 58. Can you indicate at</p> <p>11 the top of Exhibit 58 what the document number is</p> <p>12 from the federal court filing system?</p> <p>13 <b>A Document 56-1.</b></p> <p>14 Q And is that a 13-page document as indicated in the</p> <p>15 filing system?</p> <p>16 <b>A Yes.</b></p> <p>17 Q Is it -- is Exhibit 58 the proposed amended answer</p> <p>18 that was attached to Exhibit 10?</p> <p>19 <b>A Yes.</b></p> <p>20 Q Did you review Exhibit 56 -- strike that.</p> <p>21 Did you review Exhibit 58, the proposed</p> <p>22 amended answer, when the motion was filed?</p> <p>23 <b>A Yeah.</b></p> <p>24 Q Will you please go to page 10 of that document?</p> <p>25 <b>A Okay. I'm there.</b></p>



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<p style="text-align: right;">Page 69</p> <p>1 (indicating) under the heading Roman Numeral II. 2 He never obtained a final decision from the 3 South Dakota Department of Labor establishing that 4 he was denied worker's compensation benefits to 5 which he was entitled. 6 Q And does that encapsulate the basis for their 7 request for dismissal as you understood it? 8 A That's the most succinct statement of their -- of 9 this brief. I think it's the most succinct. 10 Yeah, that's what I understood was their basis for 11 the Motion to Dismiss. 12 (Whereupon, Exhibit 61 was then marked.) 13 Q (BY MR. SUTTON) Exhibit 61 is a Notice of 14 Withdrawal and Substitution of Counsel that was 15 filed in the bad faith case; is that right, Mike? 16 A Correct. 17 Q What's the date of this filing? 18 A February 20, 2019. 19 Q And who is withdrawing as counsel in Exhibit 61? 20 A It says, Attorney Westergaard informs the Court 21 that Cris Palmer is withdrawing. 22 Q At some point was it your understanding that 23 Attorney Westergaard took over as local counsel 24 rather than Mr. Palmer? 25 A Right. Right at this point in time is my</p>	<p style="text-align: right;">Page 71</p> <p>1 A Yes, she did. 2 Q (BY MR. SUTTON) And what did she rule? 3 MR. HOYT: Same objection. 4 A That Leichtnam exhausted his administrative 5 remedies because there is a settlement which was 6 approved by the division of labor -- Department of 7 Labor. 8 Q (BY MR. SUTTON) And that's consistent with the back 9 letter law that you testified about earlier? 10 A That's consistent with numerous cases saying that 11 by the South Dakota Supreme Court. 12 Q Will you please turn to the last page of the 13 report and recommendation? 14 A Okay. I'm there. 15 Q And do you see the portion where it says, Notice 16 to parties? 17 A Yes. 18 Q And does that indicate that either party could 19 object to the report and recommendation provided 20 by the Magistrate? 21 A Right. 22 Q And what's your understanding that occurs -- or 23 let me ask you, do you have an understanding about 24 what occurs if a party objects to the report and 25 recommendation?</p>
<p style="text-align: right;">Page 70</p> <p>1 understanding. 2 (Whereupon, Exhibit 62 was then marked.) 3 Q (BY MR. SUTTON) Mike, you've been handed Exhibit 62 4 which is the Report and Recommendation Regarding 5 Defendant's Motion to Dismiss, docket 58; is that 6 correct? 7 A Correct. 8 Q And is this the order that was entered by 9 Magistrate Judge Wollmann -- or at least the 10 report and recommendation from her denying 11 Zurich's Motion to Dismiss? 12 A Yes. 13 Q Will you please turn to GPNA 766? 14 A Okay. I'm there. 15 Q On the pages GPNA 766 through 772, are those the 16 pages of the order in which Judge Wollmann or 17 Magistrate Judge Wollmann addresses the Motion to 18 Dismiss? 19 A Well, she certainly does address it on those 20 pages. 21 Q Did she reach the merits of -- in Exhibit 62 of 22 whether Leichtnam, your client, in fact exhausted 23 his administrative remedies? 24 MR. HOYT: Objection; the document will speak 25 for itself, best evidence.</p>	<p style="text-align: right;">Page 72</p> <p>1 A Are you asking what generally is the procedure -- 2 Q Yes. 3 A -- or are you asking what happened here? 4 Q Generally what the procedure is. What happens? 5 A Well, on a recommendation for a dispositive motion 6 they can file objections to the -- and Judge Viken 7 or the district court judge will review and 8 determine if the -- if he wants to accept the 9 Magistrate's recommendation. 10 Q And is that a de novo review on dispositive 11 motions? 12 A Yeah, in this circumstance. I mean, it can vary, 13 but I think in this circumstance it's a de novo. 14 Q Do you recall in this case whether Zurich did file 15 an objection to the report and recommendation from 16 Magistrate Judge Wollmann? 17 A It's my -- I think they did. 18 Q And if you look at Exhibit 50, Mike, the docket 19 sheet -- 20 A Okay. 21 Q So Exhibit 50 is the -- on page 13 there is a 22 docket entry 120. 23 A Okay. 24 Q Docket 120 is the Report and Recommendation 25 Regarding Motion to Dismiss; is that right?</p>



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<p style="text-align: right;">Page 85</p> <p>1 A In discovery from Zurich's IME procedures.</p> <p>2 Q And that was in discovery produced in this bad</p> <p>3 faith case?</p> <p>4 A Which I had to drag out of them, yeah.</p> <p>5 Q Let's go to Exhibit 64 then. Exhibit 64 is the</p> <p>6 IME report by Dr. Wayne Anderson; is that right?</p> <p>7 A Yes.</p> <p>8 Q Had you had previous cases in which Dr. Anderson</p> <p>9 provided an IME?</p> <p>10 A Have I had previous -- had I seen previous --</p> <p>11 Q Yes.</p> <p>12 A Probably several, yeah.</p> <p>13 Q At the time that you received this report, had you</p> <p>14 formed an opinion -- strike that. Let me ask it</p> <p>15 this way.</p> <p>16 Were you aware of any reputation in the legal</p> <p>17 community about Dr. Anderson and his work as an</p> <p>18 IME?</p> <p>19 A Yes.</p> <p>20 Q What was your understanding of his reputation?</p> <p>21 MR. HOYT: Objection; lack of foundation.</p> <p>22 A That he was pretty credible. And I will give you</p> <p>23 some foundation because I think in -- I mean, I'd</p> <p>24 had a number of cases where I had seen his IMEs,</p> <p>25 but also -- I think the first time I was ever</p>	<p style="text-align: right;">Page 87</p> <p>1 A Yes.</p> <p>2 Q Based upon your work in this case, review of the</p> <p>3 claims file and prior experience with bad faith</p> <p>4 and work comp, did you believe that</p> <p>5 Mr. (sic) Anderson's IMEs supported terminating</p> <p>6 benefits?</p> <p>7 A No, not at all.</p> <p>8 Q Why do you say that?</p> <p>9 A Well, first of all, he -- he confirms the</p> <p>10 injuries. And without going through these one by</p> <p>11 one, he also confirmed work relatedness and</p> <p>12 confirmed the need for treatment. I think the</p> <p>13 only thing that he didn't quite agree with</p> <p>14 Drs. Lawlor and Wisniewski was as to some</p> <p>15 relatively minor aspect of the treatment, which</p> <p>16 maybe it was having something to do with opioid</p> <p>17 painkillers or something. I'm not sure. But</p> <p>18 there was some part of the treatment that he</p> <p>19 didn't -- at some point -- maybe not in this</p> <p>20 report. Maybe it was in a supplemental report or</p> <p>21 something. But I just remember the one thing that</p> <p>22 he didn't agree with was some minor aspect of the</p> <p>23 treatment that had been recommended. But he went</p> <p>24 along with pretty much all of the treatment of</p> <p>25 what the previous doctors had recommended.</p>
<p style="text-align: right;">Page 86</p> <p>1 involved with him, I actually cross-examined him</p> <p>2 in front of a jury probably in -- somewhere in</p> <p>3 1990. But he did a lot of IME work. And, you</p> <p>4 know, for a while it kind of looked like he was</p> <p>5 the employer's guy, but then he got pretty</p> <p>6 even-handed. And that was his reputation by this</p> <p>7 time, that he was pretty even-handed.</p> <p>8 Q (BY MR. SUTTON) Had you discussed his reputation</p> <p>9 with other lawyers in the Rapid City legal</p> <p>10 community?</p> <p>11 A Oh, yeah.</p> <p>12 Q How frequently?</p> <p>13 A Well, I wouldn't say every week, but, you know,</p> <p>14 usually his name would come up several times a</p> <p>15 year at a minimum because he was out there doing</p> <p>16 IMEs. And, you know, I mean, I was</p> <p>17 cross-examining him when I examined him in a jury</p> <p>18 trial when I first met him. And so I was trying</p> <p>19 to -- in that particular case I was trying to</p> <p>20 undermine his credibility so I -- you know, I had</p> <p>21 some interest in learning about him.</p> <p>22 Q In Exhibit 64 on page 7 of the IME report through</p> <p>23 page 10 there are a series of questions posed by</p> <p>24 Julie Bradford and responses by Dr. Anderson; is</p> <p>25 that right?</p>	<p style="text-align: right;">Page 88</p> <p>1 So as far as, you know, who did this favor,</p> <p>2 totally favored Joe Leichtnam.</p> <p>3 (Whereupon, Exhibit 65 was then marked.)</p> <p>4 Q (BY MR. SUTTON) Before we switch to the next</p> <p>5 exhibit, can you tell me what the date of this</p> <p>6 report is?</p> <p>7 A Well, the date of the examination is July 17.</p> <p>8 Let's see if there is a date at the end. It says,</p> <p>9 Dictated July 17. Transcribed July 18. Is there</p> <p>10 another date?</p> <p>11 Q I don't know that there is. So, I mean, you -- at</p> <p>12 least the examination occurred on July 17, 2008;</p> <p>13 is that right?</p> <p>14 A Yes.</p> <p>15 Q Will you turn to Exhibit 65, which you need to be</p> <p>16 handed.</p> <p>17 A Okay.</p> <p>18 Q Exhibit 65 is a addendum to Dr. Anderson's IME</p> <p>19 report; is that right?</p> <p>20 A Yes.</p> <p>21 Q And you were testifying earlier you thought that</p> <p>22 there might have been a document indicating there</p> <p>23 was a portion of the treatment Dr. Anderson did</p> <p>24 not agree with. Is Exhibit 65 what you were</p> <p>25 referring to?</p>



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<p>1 significant to you in prosecuting the case as part 2 of the underlying comp claim? Strike that. 3 That's a bad question. Let me reword it. 4 In your work in prosecuting the bad faith 5 case, what's the next significant event that 6 occurred in the handling of the claim? 7 <b>A In handling the claim? I believe that somewhere</b> 8 <b>along in about April of 2009, maybe it was March,</b> 9 <b>Rommismo, which was the employer, they fired</b> 10 <b>Joe Leichtnam. Terminated him for cause. Said</b> 11 <b>that he had -- he had been involved in too many</b> 12 <b>work accidents and terminated him for cause. And</b> 13 <b>what had happened -- this arose out of a fender</b> 14 <b>bender that happened in the parking lot of the</b> 15 <b>employer. Evidently he -- there had been a</b> 16 <b>blizzard. He was out on a front end loader moving</b> 17 <b>snow. Somebody in one of the company vehicles, a</b> 18 <b>pickup, came behind him. And he's going forwards</b> 19 <b>and backwards moving snow. And he backed into a</b> 20 <b>pickup that was passing behind him.</b> 21 <b>Q Why was his termination significant from your</b> 22 <b>perspective in the claim file?</b> 23 <b>A Well, because if you connected the dots Zurich had</b> 24 <b>been conducting these, I'll call them seminars,</b> 25 <b>for employers at Raffles. We haven't talked about</b></p>	<p>1 <b>because they evidently have a rule that you don't</b> 2 <b>drive behind heavy machinery operating in the</b> 3 <b>yard. And the other employee had done that.</b> 4 <b>Didn't find any fault with Joe. But about three</b> 5 <b>or four days later the head office -- home office</b> 6 <b>where the risk control guy is located, they</b> 7 <b>terminate Joe for cause. All of a sudden now</b> 8 <b>changing their position saying it was his fault</b> 9 <b>although his supervisor never did say it was his</b> 10 <b>fault. They terminate him. And that same morning</b> 11 <b>they call Zurich and tells Zurich, We just fired</b> 12 <b>this guy for cause. So then the claim handler</b> 13 <b>puts it in his claim notes he's been fired for</b> 14 <b>cause, I'm going to set up an IME with</b> 15 <b>Dr. Farnham.</b> 16 <b>So that termination for cause spurred them</b> 17 <b>into action practically in the same breath that</b> 18 <b>they were going to get Dr. Farnham to do the IME.</b> 19 <b>(Whereupon, Exhibit 67 was then marked.)</b> 20 <b>Q (BY MR. SUTTON) Exhibit 67 is Dr. Farnham's IME</b> 21 <b>report; is that right?</b> 22 <b>A Right.</b> 23 <b>Q Now, before the -- this case, had you had other</b> 24 <b>cases in which Dr. Farnham had provided an IME?</b> 25 <b>A Yes.</b></p>
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<p>1 <b>Raffles yet. Zurich was teaching that</b> 2 <b>terminations for cause can assist -- or can be</b> 3 <b>used as a -- as a basis to deny comp benefits.</b> 4 <b>Q And how do you know that Zurich was teaching that</b> 5 <b>information?</b> 6 <b>A Because I saw educational materials that they were</b> 7 <b>giving to employers through Raffles. I take it</b> 8 <b>that they had some sort of a, you know, seminar or</b> 9 <b>something, but they had these power points and so</b> 10 <b>on and they -- one of the -- some of the materials</b> 11 <b>that they handed out to these employers, including</b> 12 <b>Rommismo, Joe's employer, included examples about</b> 13 <b>how if an employee was terminated for cause, then</b> 14 <b>they could make arguments that his loss of income</b> 15 <b>or loss of -- lost time claims under worker's</b> 16 <b>compensation could be denied as not caused by the</b> 17 <b>work injury, but caused by the fact that he is out</b> 18 <b>of work for cause.</b> 19 <b>So -- and then also I said you have to</b> 20 <b>connect the dots. Well, the day -- those</b> 21 <b>materials were given to Rommismo earlier.</b> 22 <b>Rommismo then terminates Joe for cause after his</b> 23 <b>supervisor had said -- the supervisor did up an</b> 24 <b>incident report saying it wasn't his fault. It</b> 25 <b>was the fault of the guy that drove behind him</b></p>	<p>1 <b>Q Have you ever had opportunities to take his</b> 2 <b>deposition?</b> 3 <b>A I never took his deposition. I had filed bad</b> 4 <b>faith suits based on his reports previous to that.</b> 5 <b>Q Had you had opportunities to discuss Dr. Farnham</b> 6 <b>with other lawyers in the legal community?</b> 7 <b>A Plenty of opportunities.</b> 8 <b>Q Have you had cases with Dr. Farnham since this</b> 9 <b>proceeding?</b> 10 <b>A When you say this proceeding, we're talking about</b> 11 <b>Joe Leichtnam?</b> 12 <b>Q Correct.</b> 13 <b>A No. I think he's finally got basically removed</b> 14 <b>from the -- from the business.</b> 15 <b>Q What do you know about Dr. Leichtnam's (sic) --</b> 16 <b>excuse me. Let me start over.</b> 17 <b>What do you know about Dr. Farnham's</b> 18 <b>certification process and the examinations he's</b> 19 <b>taken and failed?</b> 20 <b>MR. HOYT: Objection; foundation.</b> 21 <b>A Yeah, I -- I know what his background is because I</b> 22 <b>read sworn testimony from him on that very</b> 23 <b>subject. So is your question, what do I know?</b> 24 <b>Q (BY MR. SUTTON) Yes.</b> 25 <b>A He -- like Dr. Blow, he had flunked the</b></p>



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<p>1 thousand. But, in general, the concept was if 2 they didn't pay out a -- if they pay out 3 everything that Rommesmo had paid in, Rommesmo 4 would get a refund. 5 Q (BY MR. SUTTON) How did you learn that information? 6 A How did I learn it? 7 Q Yeah. 8 A By looking at documents that Raffles gave to 9 Rommesmo. And it might say it in this particular 10 document, but I haven't read through to see if it 11 says it here. 12 Q Yeah -- 13 A But I know there is a number of documents that 14 said that. 15 Q Is Exhibit 68 a true and accurate copy of a 16 document that was produced in discovery in the bad 17 faith case? 18 A Yes. 19 Q And then the same with Exhibit 69 and Exhibit 70. 20 I just want you to confirm that those were 21 documents that are true and accurate that you 22 received in the bad faith case. 23 A 69, yeah. 24 Q How about 70? It's right there (indicating). 25 It's the Negotiation Quick Reference. Is that a</p>	<p>1 agreement as to the dollar amount, it took -- it 2 took us a while on our end to get things in place 3 for the client because we didn't want to -- we 4 wanted him to have the opportunity to do some 5 planning as to what he was going to do with that 6 money. We didn't want him to have constructive 7 receipt of it until we accomplished that. So we 8 put off collecting the money for, I don't know, 9 might have been two or three months. 10 Q The phone call that you had with Mr. Nowak, what 11 do you recall being -- strike that. Let me start 12 over. 13 The phone call regarding settlement that you 14 had with Mr. Nowak, what do you recall being 15 discussed? 16 A Well, I know that he opened the discussion about 17 settlement, about wanting to explore settlement. 18 I know that he said that -- I don't -- I can't -- 19 I won't pretend to know the exact words. I can 20 just tell you the substance. I know that he 21 basically said that we had a strong case and they 22 didn't have much to work with. 23 Q Did you also have an opportunity to have a 24 discussion with Terry Westergaard regarding 25 settlement?</p>
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<p>1 document that you received as part of discovery in 2 the bad faith case? 3 A Yes. 4 Q Now, as part of the discovery in the bad faith 5 case, were there any depositions taken by Zurich? 6 A Yeah, they took two depositions. 7 Q Who did they depose? 8 A Dr. Juel, the chiropractor, and Joe Leichtnam. 9 Q Did you have any discussions with Conrad Nowak 10 regarding the deposition of your client after the 11 fact? 12 A Yes. 13 Q What did he say to you? 14 A Well, the one thing I remember was he said that 15 Joe made a nice impression. 16 Q Now, ultimately was the bad faith case settled? 17 A Yes. 18 Q And the -- do you recall having a phone call with 19 Conrad Nowak in which there was the discussion of 20 settlement? 21 A Yeah. 22 Q Do you know how long that call was before the 23 actual settlement? 24 A It wasn't -- it wasn't too long before we reached 25 an agreement. However, the -- once we reached an</p>	<p>1 A Yeah. Terry came to my office. This was a short 2 time after -- I think it was a short time after 3 the conversation with Conrad. And I don't think 4 it took us more than about five minutes. 5 Q What did Terry say to you? 6 A I only remember -- I only remember one thing, and 7 that is he -- I believe that he asked -- I don't 8 know if I had already told him what I wanted or if 9 he came over and we had that conversation. But, 10 anyway, I said 2 million and it didn't take long 11 for us to wrap it up. 12 MR. SUTTON: I want to mark this. Do me a 13 favor, put it over this sticker. 14 And at this point we need to designate this 15 portion of the transcript as confidential and seal 16 it for -- let's put on the record, pursuant to the 17 protective order, this portion of the transcript 18 needs to be separately designated as confidential 19 and separately bound. It doesn't need to be 20 sealed. 21 (Pursuant to the protective order, this 22 portion of the transcript has been separately 23 designated as confidential and separately bound in 24 a separate transcript.) 25 MR. SUTTON: I don't have any other -- any</p>